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ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR11-384

SHERRELL JEAN WHISENANT APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** November 16, 2011 APPEAL FROM THE ARKANSAS COUNTY CIRCUIT COURT, NORTHERN DISTRICT [NO. CR 2007-60] HONORABLE DAVID G. HENRY, JUDGE AFFIRMED

RITA W. GRUBER, Judge

Sherrell Jean Whisenant was convicted by a jury on three counts of second-degree forgery and was sentenced to thirty-six months' imprisonment, sixty months' probation, and thirty-six months' imprisonment, the prison terms to be served consecutively and probation to follow her release. Whisenant brings this appeal from the judgment and commitment order of November 24, 2010, contending that the circuit court erred in overruling her objection that particular testimony violated the lawyer-client privilege. We disagree and affirm.

Arkansas Rule of Evidence 502 addresses the lawyer-client privilege. "Client" is defined, in pertinent part, as "a person . . . who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him." Ark. R. Evid. 502(a)(1) (2011). Under the general rule of privilege, the client "has a privilege to refuse to disclose and to prevent any other person from disclosing confidential

communications made for the purpose of facilitating the rendition of professional legal services to the client . . . between himself or his representative and his lawyer or his lawyer's representative." Ark. R. Evid. 502(b) (2011). A "confidential" communication is one "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." The client is among the persons who may claim the privilege. Ark. R. Evid. 502(c) (2011).

Whisenant's three charges of second-degree forgery involved her unauthorized actions on three separate checks; one was written on the account of Jane Obenoskey and bore her alleged signature. Attorney Justin Byrum Hurst testified at Whisenant's trial that he had represented Obenoskey in Garland County on forgery charges and that his "consultations with her . . . led [him] to speak with Ms. Whisenant." He testified that Whisenant contacted his office, that she admitted to him she "forged Jane Obenoskey's signature to a check," and that he "discussed her liability with her."

At this point in the testimony, Whisenant raised the following objection: "If Mr. Hurst could say that she called him and asked for advice, then it would be as an attorney, and that would be barred by attorney/client privilege." The prosecutor responded:

> I don't think he is relaying anything he told her in capacity with legal advice. He is fixing—and I don't think—I think we can establish whether or not Mr. Hurst thought she was his lawyer—or he was her lawyer. And I don't think he is going to establish that, because he was representing Ms. Obenoskey in a criminal case, where she admitted to him that she did the—the criminal deed.
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> . . . .

> Just that she forged the check and that—and that he conveyed that to the prosecutor and charges against Ms. Obenoskey were dismissed, based on what Ms. Whisenant said.

The trial court overruled Whisenant's objection. Hurst then testified that Whisenant told him she had forged Obenoskey's signature on the check that resulted in his client's being charged, that Hurst conveyed the information to the chief deputy prosecutor, and that the charges against his client were ultimately nol-prossed. Hurst said that he had only the one conversation with Whisenant, formerly known as Sherrell Stine, which took place by telephone, and that he had not seen her before he testified at trial.

Whisenant asserts that she was entitled to the attorney-client privilege because her confession about the forgery occurred when she asked Hurst, an attorney, about her potential liability for the act and that the purpose of telling Hurst her guilt was "to garner his professional opinion as to the liability." She asserts that introduction of her confession into evidence prejudiced her on all three counts.[1]

The burden of proving that a privilege applies is upon the party asserting it. *Shankle v. State*, 309 Ark. 40, 827 S.W.2d 642 (1992). "[A] prerequisite under Ark. R. Evid. 502(b) to invoking the attorney-client privilege" is a showing that the communication was made for the purpose of facilitating the rendition of professional legal services. *Parkman v. State*, 294 Ark. 339, 342, 742 S.W.2d 927, 929 (1988); *see also Henderson v. U.S.*, 815 F.2d 1189, 1192

[1]Counts I and II regarded checks for $745.32 and $77.40 payable to Ablution Day Spas. Count III was for a $1025 check on the account of Obenoskey, allegedly signed by her and endorsed by Wayne Lockhart and Whisenant. Lockhart, whose alleged signature also appeared on the back of the first two checks, testified that he had never seen any of the checks before trial and had not signed them.

(8th Cir. 1987) (finding that Henderson lacked standing to object on the basis of attorney-client privilege where the evidence clearly established he was never the attorney's client).

Whisenant relies on the statement of attorney Hurst that he "discussed her liability with her" when she telephoned his office about the check that led to his client's being charged with forgery. The subject of Hurst's testimony, however, was his representation of Obenoskey. He did not testify that he represented Whisenant or had an attorney-client relationship with her. He stated that he had no further conversations with her after the phone call, which occurred while he was acting as Obenoskey's attorney, and that he had never met Whisenant until seeing her in her trial.

The evidence did not establish an attorney-client relationship between Hurst and Whisenant, and she lacked standing to assert the privilege. The trial court did not err in ruling that the attorney-client privilege did not apply to Hurst's testimony about Whisenant's confession.

Affirmed.

VAUGHT, C.J., and PITTMAN, J., agree.